No. 82-1288

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,

v.

RUBY CLARK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Consistent with the letter and intent of the disqualification statutes and the in banc statute, may a disqualified circuit judge be deemed a judge "in regular active service" with the result that a suggestion for rehearing in banc is denied despite a 5 to 4 vote in favor of in banc review, because a "majority" of the circuit judges, *including the disqualified judge,* did not favor granting in banc review?

II. Where under the controlling decisions of the Michigan appellate courts, Michigan defamation law accords a qualified privilege to all publications about matters of public interest and concern without reference to whether the plaintiff is at the focus of the matter reported, did the majority opinion of the Court of Appeals for the Sixth Circuit err by limiting the application of the Michigan qualified privilege to those cases where the plaintiff is the focus of the matter reported?

Although petitioner is a corporation, it has no parent companies, no subsidiaries other than those wholly owned by petitioner and no "affiliates" other than two individuals, Leonard H. Goldenson, Chairman of the Board, and Elton H. Rule, Vice-Chairman, who, by reason of their stock ownership in and management positions with petitioner, are treated by petitioner as its "affiliates" for purposes of compliance with the regulations promulgated under the Securities Act of 1933.

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Petitioner, American Broadcasting Companies, Inc., respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review whether consistent with the disqualification statutes a disqualified circuit judge may be deemed a judge "in regular active service" for the purpose of determining the majority necessary to grant a rehearing in banc, and to review the judgment entered in this case which is in conflict with the controlling state defamation law.

PROCEEDINGS BELOW

Respondent commenced this case in the Circuit Court for the County of Wayne, Michigan on April 19, 1978. Petitioner removed the lawsuit to the United States District Court for the Eastern District of Michigan, Southern Division, pursuant to 28 U.S.C. §§1441-1446.

On May 16, 1980, the district court rendered its opinion granting the motion of petitioner for summary judgment, an opinion set forth at Appendix B to this petition, *infra*, at 36a. The order of dismissal, Appendix C, *infra*, at 46a, was entered on May 30, 1980.

On July 29, 1982, by a 2 to 1 vote, the Court of Appeals for the Sixth Circuit reversed and remanded the case. Appendix A, *infra*, at 1a; *Clark* v. *American Broadcasting Companies, Inc.*, 684 F.2d 1208 (6th Cir. 1982).

Petitioner applied for rehearing on August 10, 1982, suggesting the appropriateness of review in banc. On September 21, 1982, the Court of Appeals entered its order, Appendix E, *infra*, at 50a, granting a rehearing of this case in banc, noting that a "majority of the Judges of this Court in regular service have voted for rehearing of this case en banc."

On October 22, 1982, the Court of Appeals reversed its grant of in banc review, noting that the 5 to 4 vote in favor of in banc rehearing "(one active judge being disqualified) failed to attain the 6 affirmative votes required to constitute 'a majority of the [10] circuit judges who [were] in regular active service'. . .." Appendix F, *infra*, at 51a. The petition for rehearing was referred to the panel that originally heard the appeal, which panel rejected the petition by a 2 to 1 vote on November 3, 1982. Appendix G, *infra*, at 52a. The Court's mandate issued November 11, 1982. Appendix D, *infra*, at 48a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 29, 1982. Appendix A, *infra*, at 1a; 684 F.2d 1208; Appendix D, *infra*, at 48a. Petitioner timely filed a petition for rehearing and suggestion of appropriateness of rehearing in banc on August 10, 1982. On September 21, 1982, the Court of Appeals entered its order, Appendix E, *infra*, at 50a, granting a rehearing of this case in banc. On October 22, 1982, the Court of Appeals entered its order, Appendix F, *infra*, at 51a, advising that the September 21, 1982 order had been in error, rejecting petitioner's suggestion that the case be reheard in banc and referring the petition for rehearing to the original panel for disposition. On November 3, 1982, the original panel denied the petition for rehearing 2 to 1. Appendix G, *infra*, at 52a. This Petition for a Writ of Certiorari is being filed within ninety days of entry of the order of the Court of Appeals denying the petition for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

28 U.S.C. §46(c):

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service.

28 U.S.C. §47:

> No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

28 U.S.C. §455(a):

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. §455(b):

> See Appendix H, *infra*, at 53a.

STATEMENT OF THE CASE

This is a libel and invasion of privacy action brought by respondent, Ruby Clark ("Clark"), a Detroit, Michigan housewife, against petitioner, American Broadcasting Companies, Inc. ("ABC"), a corporation incorporated under the laws of, and maintaining its principal place of business in, the State of New York. The action arises out of the ABC News documentary "Sex for Sale, The Urban Battleground". The documentary reported the alarming upsurge of street prostitution in American cities and challenged the widespread contention that prostitution is a "victimless crime" (J.A.[1] 47a, 69a).

During 1976-1977, ABC News investigated the devastating impact of sex-related businesses on urban areas, the public outcry against these businesses and the steps taken by various cities to combat their spread. The results of this investigation were included in the documentary broadcast on April 22, 1977. It reported:

> This is a report about the damage . . . sex businesses do to America's cities . . . and to its neighborhoods.
>
> * * *
>
> It is about the battles being waged in almost every city and community against sex business blight . . . some victories, and some notable defeats on the battlefields of the cities. [J.A. 47a]

[1] Citations to "J.A." are to the Joint Appendix filed in the Court of Appeals for the Sixth Circuit. Citations to "Appendix A" or other alphabetically designated appendices refer to the Appendix to this petition.

The documentary was based on investigations in various urban centers, including New York, Boston and Detroit. As broadcast it included views of urban areas blighted by sex-related businesses, interviews with affected citizens, public officials and experts and statements by persons who were engaged in sex-related businesses (J.A. 45a-91a).

Acts I and II of the documentary focused on the devastating impact that sex businesses had had on New York City's Times Square area. Acts III and IV focused on Detroit and the often pitched battle along its Woodward Corridor between the incumbent, middle-class residents and the sex businesses that threatened to overrun their neighborhoods. The broadcast lauded the "Detroit Plan," which involved both citizen activism and effective zoning regulations in an attempt to control sex businesses. *See, Young* v. *American Mini Theaters Inc.*, 427 U.S. 50 (1976). (J.A. 69a-79a).

It was in the Detroit segment of the report that respondent, Ruby Clark, made her sole and very brief appearance. An ABC News crew had filmed Mrs. Clark walking alone along a public sidewalk in Detroit in the fall of 1976 (J.A. 13a). The report used a few seconds of this film in conjunction with correspondent Howard K. Smith's report about the humiliating plight of innocent black female residents of neighborhoods adjacent to areas where street prostitution was flourishing. Specifically, while Mrs. Clark was shown walking along a public street, Smith reported:

> But for black women whose homes were there, the cruising white customers were an especially humiliating experience. [J.A. 73a]

This brief sequence constitutes the sole basis for this action (J.A. 5a-6a). The only reference to Mrs. Clark was the view of her walking by herself along a public street in broad daylight. Mrs. Clark was not identified by name, and she made no comment. The Howard K. Smith narrative that accompanied her image portrayed her and other black

housewives in the area as undeserving victims of the blight caused by sex-related businesses (J.A. 73a).[2]

On April 19, 1978, almost a year after the broadcast, Clark filed her Complaint in the Circuit Court for Wayne County, Michigan (J.A. 4a). She asserted two claims. First, she claimed that the manner in which the broadcast depicted her, when viewed in conjunction with the commentary that accompanied her image, "insinuated and conveyed the impression that Plaintiff, Ruby Clark, was a common street prostitute." Complaint ¶5. (J.A. 5a). She also claimed that "televising Plaintiff, Ruby Clark, on a street scene, without obtaining her prior written or verbal consent," invaded her privacy. Complaint ¶10. (J.A. 5a-6a).

Petitioner removed the case to the United States District Court for the Eastern District of Michigan, Southern Division (J.A. 1a), pursuant to 28 U.S.C. §§1441-1446, and invoked the diversity jurisdiction of the district court under 28 U.S.C. §1332, based on the diverse citizenship of the parties and respondent's claim for damages in excess of $10,000.00.

On February 25, 1980, petitioner moved for summary judgment, asking the district court to view the documentary, review the transcript and determine whether under the controlling Michigan law the broadcast was reasonably capable of conveying the libelous meaning claimed by respondent or of invading her privacy.

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[2] As noted by the Court of Appeals, Appendix A, *infra*, at 3a; 684 F.2d at 1211,

> Sheri Madison, a black female resident of the neighborhood plagued by prostitution, appeared on the screen seconds after Plaintiff. She stated: "Almost any woman who was black and on the street was considered to be a prostitute herself. And was treated like a prostitute."

For a more extensive description of the pertinent portions of the broadcast, petitioner refers this Court to the cogent comments of Judge Brown in his dissenting opinion, Appendix A, *infra*, at 20a-35a; 684 F.2d at 1219-1226.

On May 16, 1980, the district court ruled that the broadcast "Sex For Sale, The Urban Battleground", which the court had viewed in its entirety, "was of public interest" (J.A. 396a; Appendix B, *infra*, at 38a). The district court also stated, "I viewed this portion of the film several times; I could estimate 3 to 4 to 5 times" (J.A. 398a; Appendix B, *infra*, at 40a) and ". . . read and reread the transcript" (J.A. 400a; Appendix B, *infra*, at 40a).

Based on this viewing, the Court held:

> There is nothing in her appearance which would suggest, I think, to the reasonable mind that her activity would, in any way, parallel that of the act of prostitution, as varied as those acts may be. Thus, I saw nothing offensive; I saw nothing libelous and I saw no invasion of privacy in the act of Mrs. Clark by ABC.
>
> I also read and reread the transcript and especially the narrow portion which focused on Mrs. Clark. I find those to be equally as innocuous.
>
> * * *
>
> I must confess that I have agonized over this because I have attempted to place myself as a viewer looking at the program to determine if Mrs. Clark, under any reasonable criterion, could be viewed as a prostitute. . . . I cannot find any justifiable basis to deny the Defendant's motion. [J.A. 399a-401a; Appendix B, *infra*, at 40a-41a]

An Order dismissing the action was entered on May 30, 1980. Appendix C, *infra*, at 46a.

Respondent appealed to the Court of Appeals for the Sixth Circuit, where, by a vote of 2 to 1, the decision of the district court was reversed. The two-judge majority ruled that the district court judge had applied an incorrect standard in granting summary judgment (Appendix A, *infra*, at 6a-7a; 684 F.2d at 1213) and that the Michigan qualified privilege applicable to publications about matters of public

interest and concern did not apply to this case because respondent was not the focus of the broadcast. The dissenting judge vigorously disputed both of the majority's holdings, especially the majority's truncation of the Michigan privilege.

Petitioner timely petitioned for rehearing, challenging the two-judge majority's ruling that the Michigan qualified privilege applies only where the plaintiff is the focus of the public interest publication. The petition also suggested the appropriateness of a rehearing in banc to secure uniformity of decisions within the Sixth Circuit because the majority's disposition was in conflict with other recent decisions of the Circuit applying Michigan defamation law.

On September 21, 1982, the Court of Appeals entered its order, granting rehearing in banc, Appendix E, *infra*, at 50a, stating:

> A majority of the Judges of this Court in regular service have voted for rehearing of this case en banc.

On October 22, 1982, the Court reversed its September 21, 1982 order, Appendix F, *infra*, at 51a:

> The Chief Judge has now directed me to advise that his ruling was made in error and that in fact the 5-4 vote (one active judge being disqualified) failed to attain the 6 affirmative votes required to constitute "a majority of the [10] circuit judges who [were] in regular active service" within the meaning of Rule 35(a) of the Federal Rules of Appellate Procedure.
>
> * * *
>
> . . . [T]he motion for rehearing is referred to the panel which originally heard the appeal.

On November 3, 1982, the petition for rehearing was denied 2 to 1. Appendix G, *infra*, at 52a.

REASONS FOR GRANTING THE WRIT

I. IN RULING THAT A JUDGE DISQUALIFIED TO VOTE ON WHETHER TO REHEAR A CASE IN BANC IS NEVERTHELESS TO BE INCLUDED AS A CIRCUIT JUDGE "IN REGULAR ACTIVE SERVICE" FOR THE PURPOSE OF DETERMINING WHETHER A "MAJORITY OF THE CIRCUIT JUDGES WHO ARE IN REGULAR ACTIVE SERVICE" HAVE VOTED TO REHEAR THE CASE IN BANC, THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, TO REMOVE THE CONFUSION STILL SURROUNDING IN BANC PROCEDURES AND TO BRING THOSE PROCEDURES INTO HARMONY WITH THE FEDERAL STATUTES ON DISQUALIFICATION OF JUDGES.

Five times since 1941 this Court has granted certiorari to resolve questions about in banc procedure and the composition of courts sitting in banc.[3]

The fact that this Court has five times reviewed cases involving technical aspects of in banc procedure is indicative of the confusion surrounding certain aspects of that procedure and the importance of in banc hearings. As

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[3] The five cases are: *Textile Mills Corp.* v. *Commissioner*, 314 U.S. 326 (1941), holding that the circuit courts have power to hear or rehear cases in banc; the *Western Pacific Railroad* case, 345 U.S. 247 (1953), construing the 1948 in banc statute to be a grant of power to the courts to order hearings or rehearings in banc, not the creation of a right in a litigant to such a hearing; *Shenker* v. *Baltimore & Ohio R. Co.*, 374 U.S. 1 (1963), holding that the procedure for handling in banc petitions is a matter of discretion with the circuit courts; *United States* v. *American-Foreign S.S. Corp.*, 363 U.S. 685 (1960), holding that a retired circuit judge is ineligible to participate in a rehearing in banc; and *Moody* v. *Albermarle Paper Co.*, 417 U.S. 622 (1974), holding that senior judges who sat on a case initially are ineligible to vote on the question of whether to grant rehearing in banc.

succinctly noted in one of those decisions, the *Western Pacific Railroad* case, 345 U.S. 247, 260 (1953),

> [t]he *en banc* power, confirmed by §46(c), is, as we emphasized in the *Textile Mills* case, a necessary and useful power—indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate. If §46(c) is to achieve its fundamental purpose, certain fundamental requirements should be observed by the Courts of Appeals. In the exercise of our "*general power to supervise the administration of justice in the federal courts,*" the responsibility lies with this Court to define these requirements and insure their observance. [Emphasis added; footnotes omitted]

It is submitted that the question concerning disqualified judges presented in this case is as important to the administration of justice as the questions concerning in banc hearings previously decided by this Court.

It is also submitted that the disqualification question presented in this case arises from a latent and as yet unresolved ambiguity in 28 U.S.C. §46(c), the statute authorizing in banc hearings and rehearings. As this Court noted in *Western Pacific*, 345 U.S. at 267, this statute is "not without ambiguity."

28 U.S.C. §46(c) provides:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by *a majority* of the circuit judges of the circuit *who are in regular active service.* A court in banc shall consist of all circuit judges *in regular active service.* [Emphasis added]

The term "in regular active service" appears twice in the statute. Its meaning, which is not defined in the statute, is at the center of the present disqualification controversy

and also at the core of two previous in banc issues decided by this Court. In *American-Foreign S.S. Corp., supra*, this Court interpreted "regular active service" to exclude senior judges from in banc panels. In *Moody, supra,* the Court interpreted the term to exclude senior judges from voting to consider a case in banc. Left undecided in those two cases but squarely presented herein is the question of whether a disqualified judge is a judge "in regular active service" for the purpose of determining the majority necessary to order a hearing or rehearing in banc.

There are two compelling reasons why a disqualified judge should not be counted as a judge "in regular active service" for the purpose of determining the majority required under 28 U.S.C. §46(c).

The first reason is grounded in the mandate that a disqualified judge shall not hear or determine a case. Counting a disqualified judge as a regular active judge for the purpose of determining the majority necessary to grant in banc review may, and in this case, did, result in a disqualified judge determining a case.

This danger is articulated in a commentary, Note, *En Banc Petition–Decisive Presence of a Disqualified Judge,* 47 St. John's L. Rev. 345 (1972), examining the significance of a Second Circuit decision relied upon in the Sixth Circuit's October 22, 1982 reversal of its grant of in banc review, *Zahn* v. *International Paper Co.,* 469 F.2d 1033 (2d Cir. 1972), *aff'd on the merits,* 414 U.S. 291 (1973). In *Zahn,* Chief Judge Friendly had disqualified himself, leaving seven active judges to consider the petition for a rehearing in banc. (The ninth judgeship in the Second Circuit was vacant at the time.) Four of the seven judges voted to rehear the appeal in banc, but the rehearing in banc was, 469 F.2d at 1040,

> . . . denied for want of an affirmative vote "by a majority of the circuit judges of the circuit who are in regular active service."

This led the commentator to observe, 47 St. John's L. Rev. 345, 347-348:

> Had the Chief Judge not disqualified himself the count of the court would have been eight and a majority of five would have been needed to en banc the case. Since four judges voted to en banc, Chief Judge Friendly's vote would have been decisive. A "no" vote would leave a 4-4 tie and the petition would be denied. A "yes" vote would have resulted in a 5-4 decision to en banc. The decisive-minority's position to include a disqualified judge in the count of the court and thus to require a vote of five to en banc has the effect of equating Chief Judge Friendly's disqualification with a "no" vote. This flies in the face of section 47 of the Judicial Code which provides that "No [disqualified] judge shall hear or *determine* [emphasis added in note] an appeal. . . ." The purpose of this statute is to ensure that the court consist of only impartial judges [citing in a footnote *Moran* v. *Dillingham*, 174 U.S. 153, 157 (1899), involving a predecessor to section 47]. Under predecessor statutes a disqualified judge could cast no vote and if he sat with another judge as a circuit court, the decision of the court was that of the other judge.
>
> If a majority vote were needed to reverse and the disqualified judge were included in the count of the above two-man court, a majority could never be reached and any appeal would have been automatically affirmed. This result was negated by the clear wording of the statute.
>
> By including Chief Judge Friendly in the count of the court, the decisive-minority increased the number of votes needed to en banc as if the Chief Judge had voted against en bancing the case. Such a procedure flies in the face of the clear mandate of the Judicial Code which exempts a disqualified judge from "determining" a case. Upon disqualification, the Chief Judge should have properly been accorded no weight; his vote should have

> been neutralized by reducing the count of the regular active bench to seven and, thus, the four judges who voted for en banc reconsideration of *Zahn* should have carried the day. [Footnotes omitted]

Section 47 of the Judicial Code, 28 U.S.C. §47, the subject of the quoted comment, pertains to the disqualification of a trial judge to hear an appeal from the decision of a case or issue tried by him. Presumably, it is therefore not the basis of the disqualification referred to in the Chief Judge's October 22, 1982 order. However, the parallel policy of mandatory disqualification of a judge under any of the circumstances set forth in 28 U.S.C. §455(b) and "in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. §455(a), is equally entitled to protection against the erosion of that policy that would be posed by counting a disqualified judge among the judges "in regular active service" for the purposes of 28 U.S.C. §46(c). As this Court noted with respect to a prior disqualification statute, Act 1891, c.517, §3, in *Moran* v. *Dillingham*, 174 U.S. 153, 157 (1899),

> Whatever may be thought of the policy of this enactment, it is not for the judiciary to disregard or to fritter away the positive prohibition of the legislature.

The quoted commentary furnishes additional support for the vigorous dissent of Judge Timbers in *Zahn*, 469 F.2d at 1042:

> . . . I think it is most unfortunate that en banc reconsideration of such a substantial question of unusual importance is being *denied* despite the 4-3 vote by the active judges of this Court *in favor* of en banc reconsideration. . . . Fed. R. App. P. 35(a) authorizes a rehearing en banc only when ordered by a "majority of the circuit judges who are in regular active service." With only eight active judges, when one judge by reason of disqualification is *excluded* from voting whether to en banc but is *included* in determining what constitutes a

> majority, then the rule appears to require five out of seven to en banc the case. Such a result seems to me to be most unfortunate in thwarting the clear intent of the rule. It is especially unfortunate here where the rule operates to permit a *minority* of the active judges of the Court to deny en banc reconsideration of one of the more pressing issues of our day—an issue to which the best thinking of legal scholars, lawyers and judges has been devoted. [Emphasis in original]

Similarly, in the instant case, five of the nine "qualified" active judges in the Sixth Circuit agreed that the issues raised in petitioner's petition for rehearing, which contended that the two-judge opinion of July 29, 1982 is in serious conflict with other decisions of the Sixth Circuit and with controlling Michigan precedent, should have been reconsidered by the court in banc. Yet the presence of one disqualified judge on the court in effect thwarted the will of the majority. Permitting a minority to deny in banc review of this two-judge determination under the circumstances presented in this case frustrates, not serves, the goal of 28 U.S.C. §46(c), as set forth in Judge Mansfield's concurring opinion in *Zahn*, 469 F.2d at 1041:

> . . . [T]o achieve intracircuit uniformity by assuring that where questions of exceptional importance are presented the law of the circuit will be established by the vote of a majority of the full court rather than by a three-judge panel. H.R. Rep. No. 1246, 77th Cong., 1st Sess. (1941); Hearings on S. 1053; before a Subcommittee of the Senate Committee, 77th Cong., 1st Sess. 14-16 (1941).

The second compelling reason for concluding that a disqualified judge should not be counted as a judge "in regular active service" is apparent from the wording of 28 U.S.C. §46(c), when the statute is construed in accordance with the basic rule acknowledged by this Court in *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934):

> . . . "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 433.

Significantly, the identical phrase, "in regular active service," is used twice within the same statutory provision, 28 U.S.C. §46(c):

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are *in regular active service*. A court in banc shall consist of all circuit judges *in regular active service*. [Emphasis added]

If the disqualification policy of 28 U.S.C. §455(a)-(b) is not to be "frittered away" by the appellate judiciary, it is clear that a disqualified judge is barred from sitting as a member of a "court in banc." Therefore, in the second sentence of 28 U.S.C. §46(c), "in regular active service" must be deemed to include the requirement that the judge not be disqualified under 28 U.S.C. §§455(a)-(b) or other federal disqualification statute. Under the recognized rule of construction, this requirement applies equally to defining "in regular active service" for the purposes of the first sentence of 28 U.S.C. §46(c).

In short, both the readily apparent confusion about the impact of disqualification upon the in banc process and also the existence of a significant conflict between the federal disqualification statutes and the Sixth Circuit's interpretation of 28 U.S.C. §46(c) indicate the need for this Court to review the October 22, 1982 order of the Sixth Circuit, in order to decide a question of importance to the administration of judicial business in the circuit courts.

II. THE MAJORITY'S RULING THAT THE MICHIGAN QUALIFIED PRIVILEGE TO PUBLISH MATTERS OF PUBLIC INTEREST AND CONCERN DOES NOT ATTACH TO PUBLICATIONS WHERE PLAINTIFF IS NOT THE FOCUS OF THE PUBLICATION IS IN CONFLICT WITH BOTH THE CONTROLLING MICHIGAN LAW AND THE EDICT OF THIS COURT THAT THE STATES THEMSELVES ESTABLISH THEIR OWN STANDARD OF LIABILITY IN LIBEL CASES NOT INVOLVING A PUBLIC OFFICIAL OR A PUBLIC FIGURE.

Nearly ten years ago this Court held that the States should set the standard for liability in defamation cases that involve neither a public official nor a public figure.[4]

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 345-347 (1974), this Court concluded

> . . . that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.

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[4] In asking this Court to reject the opinion of the majority below concerning an issue of Michigan law, petitioner is aware that this Court ordinarily defers to a court of appeals' determination of an issue of state law unless that determination is clearly erroneous, particularly when that issue has not been decided by the highest state appellate court and the determination derives some support from the state authorities. *United States* v. *Durham Lumber Co.*, 363 U.S. 522, 526-527 (1960); *Bishop* v. *Wood*, 426 U.S. 341, 345-347 (1976). As demonstrated by Judge Brown's dissent in the instant case, however, the majority's restriction of the scope of the Michigan qualified privilege is not supported by the Michigan decisions. Review by this Court is therefore appropriate, particularly in view of the Court of Appeals' usurpation of the power, recognized by this Court to be the province of the States, to define the appropriate standard of liability for a publisher or broadcaster of alleged defamatory falsehoods about private individuals.

At the very least, Judge Brown's dissent on the qualified privilege issue reveals that this case presents an important issue of law that deserves the learned consideration of the Court of Appeals in banc, and therefore underscores the error of the Court of Appeals in denying in banc reconsideration in the face of the affirmative votes of five of the nine judges qualified to vote on whether to review the case in banc.

> We hold that, so long as they do not impose liability without fault, the States *may define for themselves the appropriate standard of liability* for a publisher or broadcaster of defamatory falsehood injurious to a private individual. [Emphasis added; footnote omitted][5]

Michigan has long accorded a qualified privilege to all communications about matters of public interest and concern without regard to whether the communication focuses on the plaintiff or not:

> Qualified privilege exists in a much larger number of cases. *It extends to all communications* made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty. And the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation.

Bacon v. *Michigan Central R. Co.*, 66 Mich. 166, 170, 33 N.W. 181, 183 (1887) (Emphasis added).

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[5] Although *Gertz*, *supra*, forbids the imposition of liability without fault, portions of the majority opinion below would suggest indeed that truth of the statement made is a prerequisite to invocation of the Michigan qualified privilege, a conclusion that is not supported by Michigan law, renders the privilege a nullity and raises the spectre of liability without fault for any defamatory statement that is not in fact true. Specifically, the majority, in determining, Appendix A, *infra*, at 14a-15a; 684 F.2d at 1216-1217, that respondent's "participation in the Broadcast" was "not in the public interest" and thus not "within the scope of Michigan's qualified privilege as a matter of law", noted that

> Plaintiff was not a prostitute when this segment of the Broadcast was filmed, nor was she one when the Broadcast was aired.

In other words, if respondent had been a prostitute, her appearance in the broadcast would have been in the public interest and therefore subject to the qualified privilege. However, in that event, a depiction of her as a prostitute would have then been facutal, and there would remain no cause of action in which to apply the hard-won—and apparently meaningless—privilege.

Michigan has recognized this privilege because its public policy is to encourage free discussion of ideas, and has done so despite the fact that private interest may suffer as a result:

> This defense rests upon considerations of public policy. "The great underlying principle upon which the doctrine of privileged communications stands," we held in *Bacon* v. *Michigan Central R. Co.*, 66 Mich 166, 169, 170, "is public policy. . . . It rests upon the same necessity that requires the individual to surrender his personal rights and to suffer loss for the benefit of the common welfare." The term privilege, then, having such origins, relates to a situation or occasion in which the importance of the criticism uttered by the defendant . . . justifies a modification, or, indeed, a withdrawal, of the protection normally afforded our citizens.

Lawrence v. *Fox*, 357 Mich. 134, 137-138, 97 N.W.2d 719, 721 (1959).

Michigan has specifically applied this qualified privilege to newspaper reports about matters of public interest. *See*, *Lawrence* v. *Fox*, *supra*, a case that involves a public official but defines the law and policy applicable to all public interest publications.

Michigan has also expressly recognized the applicability of the qualified privilege to television documentaries about matters of public interest and concern where the plaintiff is a private figure and not the focus of the broadcast. *Weeren* v. *Evening News Association*, 2 Mich. App. 74, 138 N.W.2d 526 (1965), *rev'd on other grounds*, 379 Mich. 475, 152 N.W.2d 676 (1967).

The thread that runs through the Michigan qualified privilege cases is that it is the "*occasion*" for the publication that determines the existence or non-existence of the

qualified privilege, not whether the publication focuses on the plaintiff or not:

> Considerations of social policy similar in principle, but of lesser intensity, result in a privilege not absolute but conditional, or, as sometimes put, qualified, or defeasible. These situations are of a great variety, all of them responding more or less directly to Baron Parke's famous statement in *Toogood* v. *Spyring* (Ex 1834), 1 CM&R 181, 193 (149 Eng Rep 1044) that a publication is privileged when it is "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." These are the occasions in which one has not an absolute but a limited immunity to speak or publish words in and of themselves defamatory.

Lawrence v. *Fox*, *supra*, 357 Mich. at 139, 97 N.W.2d at 721 (Footnotes and citations omitted).

In this case, the occasion for the broadcast of "Sex For Sale" rendered the broadcast qualifiedly privileged. As the district judge found, the broadcast "Sex For Sale" concerned a matter of public interest:

> I'm of the opinion that the broadcast was of public interest. [J.A. 396a; Appendix B, *infra*, at 38a]

Neither the majority nor the dissent quarrels with the accuracy of this finding.

Nevertheless the majority below held that the Michigan qualified privilege would not be applicable to the case on remand. In the process, the majority engaged in a major revision of the Michigan privilege:

> The qualified privilege does not extend, however, to plaintiffs who are not the focus of the alleged public interest publication. A plaintiff who is merely an incidental figure in the broadcast is not, as a matter of law, within the scope of the privilege. [Appendix A, *infra*, at 13a; 684 F.2d at 1216]

As Judge Brown's dissent demonstrates, Michigan law does not support such a truncation of the qualified privilege. His opinion bears extended citation:

> However, Michigan law does not countenance such a narrow view of the qualified privilege. A fair reading of Michigan law indicates that the appearance of an individual in a public interest documentary is within the scope of a qualified privilege attaching to that documentary as long as the individual has a reasonable connection with the subject matter of the documentary. The ABC documentary illustrated the impact on the women in an entire neighborhood from the invasion of the sex-related businesses. Because Mrs. Clark was part of this broad category of neighborhood women who were subject to the humiliation of misidentification as a prostitute, her appearance was within the scope of the qualified privilege.
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> * * *
>
> The case of *Lawrence* v. *Fox*, 357 Mich. 134, 97 N.W.2d 719 (1959), is also highly instructive. *Lawrence* indicates that the threat of libel, which could "chill" the vigilance of the press, led to Michigan's adoption of the defense of privilege for certain publications. . . . *Lawrence* . . . determined that the external circumstances or occasion of the communication, not the actual words used, would determine the scope of the privilege.
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> * * *
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> This court in *Schultz* v. *Newsweek, Inc.*, 668 F.2d 911 (6th Cir. 1982) (applying Michigan law) concluded:
>
> > The court must decide as a matter of law whether there is a recognized public or private interest which would justify the utterance or publication. The privilege attaches to reports on matters of general public interest even though the plaintiff is a private individual.

Id. at 918. Similarly, the district court opinion that was affirmed in *Schultz* v. *Newsweek, Inc.* reported at 481 F. Supp. 881 (E.D. Mich 1979) and authored by now Circuit Judge Kennedy, stated that "[u]nder Michigan law, there is a qualified privilege to publish information which is in the public interest," *id.* at 884, and implied that the entire article comprising the communication is within the scope of the privilege as long as the communication does not stray into discussing areas of concern not within the reasonable limits of the public interest.

In *Schultz* v. *Reader's Digest Ass'n*, 468 F. Supp. 551 (E.D. Mich. 1979) (Freeman, J.) (applying Michigan law), plaintiff argued that the qualified privilege did not apply because he was an incidental figure in news stories concerning the disappearance of Jimmy Hoffa. Again, the court indicated that the "scope" of the unqualified privilege is determined by the subject matter of the communication, in this case "the question of who Hoffa was to meet on the day he disappeared," and not necessarily the persons discussed in the articles themselves:

> [T]he Court is of the opinion that an article involving a matter of public concern is subject to a qualified privilege under Michgan law. Although there can be no dispute that the article in question involved a matter of public concern, the plaintiff contends that the qualified privilege should not be applied to him because he was not a central figure in the Hoffa disappearance. Whatever role Schultz played in this matter, it is clear to the Court that the question of who Hoffa was to meet on the day he disappeared was and is an important matter of public concern.

Id. at 562.

Appendix A, *infra*, at 30a-33a; 684 F.2d at 1223-1225 (Footnote omitted).

The majority's narrowing of the Michigan privilege violates this Court's direction in *Gertz, supra,* that the States themselves, not the federal courts, set the standard for liability in private figure defamation cases. What the majority has done is to superimpose the federal involuntary public figure guidelines of *Gertz, supra*, 418 U.S. at 351, on Michigan defamation law. Michigan has not chosen to so restrict its law of privilege, and the majority was not free to disregard Michigan law.

Moreover, the majority opinion flies in the face of the Michigan public policy which fosters the free flow of ideas:

> There is no need, at this date in our history, to urge that it is necessary to free institutions that the press itself be free. . . . Governmental interference is not the only threat to . . . freedom [of the press]. *On the contrary, a narrow or restrictive interpretation of the law of privilege in libel actions is equally dangerous.*

Lawrence v. *Fox, supra,* 357 Mich. at 137, 97 N.W.2d at 720 (Emphasis added).

The upshot of the majority's treatment of the Michigan public policy favoring broad discussion of *all* matters of public interest and concern is to chill discussion, not encourage it. As Judge Brown succinctly put it:

> While under current precedents it appears that the First Amendment is not implicated, it appears to me that the majority's disposition of this case will make the filming of television documentaries unduly risky and therefore the majority's disposition is not in the public interest. [Appendix A, *infra*, at 35a; 684 F.2d at 1226]

CONCLUSION

The Court of Appeals' October 22, 1982 reversal of its prior grant of rehearing in banc presents an important question of federal law not yet settled by this Court:

Whether, consistent with the disqualification statutes, a disqualified circuit judge can be included as a judge "in regular active service" for the purpose of determining the number of votes necessary to hear or rehear a case in banc.

The majority decision also raises the issue of a federal court abridging a State's interest in defining the appropriate standard of liability in private figure defamation cases. Review should be granted to reinforce this Court's policy, announced in *Gertz, supra*, that the States set the standards of liability in such cases, and to demonstrate once and for all that the federal judiciary may not revise or tinker with the standards adopted by the States.

Petitioner therefore respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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